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No. 95-1242

Supreme Court, U.S.  
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

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MICHAEL O. LEAVITT, As Governor of the State of Utah;  
and JAN GRAHAM, As Attorney General of the  
State of Utah,

Petitioners,

v.

JANE L., JANE F., and JULIE S., On Behalf of Themselves  
and All Others Similarly Situated; et al.,

Respondents.

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BRIEF OF *AMICI CURIAE* ON PETITION FOR WRIT OF  
CERTIORARI IN SUPPORT OF PETITIONERS BY THE  
STATES OF  
NEBRASKA, CALIFORNIA AND MISSISSIPPI

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### QUESTIONS PRESENTED

1. Consistent with the elementary principle that a federal court should not extend its invalidation of a state statute further than necessary to dispose of the case before it, can the federal court of appeals invalidate, in its entirety and on the basis of severability, a state statute regulating abortion when the result is to invalidate the remaining constitutional portions of a state law?

2. Consistent with *Planned Parenthood v. Casey*, can the federal appellate court rely on *Thornburgh v. American College of Obstetricians & Gynecologists* to invalidate a state statute that requires a physician who performs an abortion to use a procedure that gives a viable fetus the best chance of survival, so long as that procedure is consistent with preventing grave damage to the woman's medical health and does not create an undue burden on the woman's right to an abortion?

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BRIEF FOR THE STATES OF NEBRASKA, ET AL., AS  
*AMICI CURIAE* IN SUPPORT OF PETITIONERS

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**INTEREST OF THE AMICI**

Nebraska and the other named states submit this brief as amicus curiae in support of Petitioners Michael O. Leavitt, Governor of the State of Utah, and Jan Graham, Attorney General of Utah. The Petitioners have requested this Court to review two issues. The first issue involves the Tenth Circuit's invalidation of Utah's ban on post-viability abortions. The court struck down the post-viability ban pursuant to its

interpretation of Utah State law regarding severability of statutes. In so doing, the Tenth Circuit ignored the explicit language of the severability clause contained in the Utah abortion act. The effect of the Tenth Circuit's ruling was to prevent state officials from enforcing a constitutionally valid state law. The amici states have an interest in seeing that a federal court does not extend its invalidation of a state statute further than necessary to dispose of the case before it, especially when legislative intent regarding severability is clear.

The second issues presented involves the Tenth Circuit's reliance upon this Court's decision *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) to invalidate Utah Code Ann. §§ 76-7-307 and 308. Sections 307 and 308 regulate abortions performed when there is a reasonable possibility that the unborn child can survive outside of the womb by prohibiting methods of abortion intended to kill or inure the unborn child, thus mandating an attempt to preserve the child's life. These provisions do not apply if they conflict with an attempt to preserve the mother's life or prevent grave damage to her medical health. The amici states contend that the Tenth Circuit's reliance upon *Thornburgh* was erroneous, as that case was substantially undermined by this Court's subsequent opinion in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). In *Casey*, this court abandoned the rigid trimester framework set forth in *Roe v. Wade*, 411 U.S. 113 (1973),

and replaced it with an undue burden test. Amici submit that sections 307 and 308 are clearly constitutional pursuant to *Casey*, which stressed that the State not only has legitimate interests in the health of the woman, but also in protecting human life.

The Tenth Circuit's ruling calls into question the standard to be applied in fashioning laws designed to protect viable unborn human life. Given this Court's ruling in *Casey*, amici desire an authoritative ruling from this Court as to *Thornburgh's* continued applicability.

#### SUMMARY OF THE ARGUMENT

The Tenth Circuit erred in striking down Utah's ban on post-viability abortions. The Tenth Circuit held that, pursuant to Utah law regarding severability of statutes, the post-viability ban could not be severed from an unconstitutional subsection of the statute which prohibited performance of nearly all pre-viability abortions. In so doing, the Tenth Circuit prohibited *state officials* from enforcing a *constitutional portion of a state statute*.

The court ignored the clear intent of the Utah Legislature, which was conveyed in a severability clause within the Abortion Act, that it would have enacted each "provision, section, subsection, sentence, clause, phrase, or word" of the Abortion Act, regardless of whether another portion of the statute was held unconstitutional. Under Utah law, the test for determining whether an unconstitutional statutory provision can be severed from the remainder of the

statute is to see whether the remaining portions of the statute can stand alone and serve a legitimate purpose. Subsection 76-7-302(3) can clearly stand alone and fulfill a legitimate legislative purpose. The Tenth Circuit's application of Utah's severability law was clearly erroneous.

The Tenth Circuit also invalidated Sections 76-7-307 and 308, which require that the medical procedure and the medical skills used in a post-viability abortion must be calculated, in the "best medical judgment of the physician," to give the unborn child the "best chance of survival," while at the same time preventing the woman's death or grave damage to her health.

In striking down sections 307 and 309, the court relied on this Court's ruling in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747. *Thornburgh*, however, was substantially undermined by this Court's subsequent opinion in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). *Casey* rejected the rigid trimester framework set forth in *Roe v. Wade*, 411 U.S. 113 (1973) and revised the woman's right to abortion from a virtually unassailable fundamental right subject to strict scrutiny review to a liberty interest subject to undue burden analysis. The Tenth Circuit erred in applying the rigorous trimester framework and strict scrutiny standard of *Thornburgh* to invalidate Utah's choice-of-method provisions. Those provisions do not place an undue burden upon a woman's right to abort a viable fetus, and are consistent with *Casey's*

emphasis on the State's interest in protecting viable fetal life.

## ARGUMENT

### I.

#### **THE TENTH CIRCUIT'S DECISION VIOLATES THE ELEMENTARY PRINCIPLE THAT A FEDERAL COURT SHOULD NOT EXTEND ITS INVALIDATION OF A STATE STATUTE FURTHER THAN NECESSARY TO DISPOSE OF THE CASE BEFORE IT.**

A significant and important issue presented in this case was the constitutionality of restrictions imposed by Utah upon post-viability abortions. The district court found that the post-viability restrictions were constitutional pursuant to this Court's holdings in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). The Tenth Circuit did not reach or rule upon this issue. Instead, the Court disposed of this issue by holding that under Utah law regarding severability, the unconstitutional ban on pre-viability abortions was not severable from the post-viability restrictions.<sup>1</sup> The effect of this ruling was that state officials were precluded from enforcing constitutional portions of a state law by a federal court.

A review of the severability clause at issue in this case reveals that the Tenth Circuit's ruling was clearly erroneous. Under Utah law, the test for determining if an unconstitutional statutory provision can be severed from the remainder of the



statute "is primarily a matter of legislative intent." *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406, (Utah 1986). This is generally determined "by whether the remaining portions of the Act can stand alone and serve a legitimate legislative purpose." *Id.*

The district court correctly followed Utah law. The court held that the post-viability ban in subsection 76-7-302(3) was severable because, standing alone, it served a legitimate legislative purpose. In so holding, the district court gave effect to the explicit language of the severability clause contained in the Utah Abortion Act:

If any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

Utah Code Ann. § 76-7-317 (1974) (emphasis).

Section 76-7-317 was a plain and unambiguous declaration by the Utah Legislature that the post-viability ban on abortions contained in subsection 76-7-302(3) was severable from the near-total ban on abortions contained in subsection 76-7-302(2). The Legislature made it clear that it would have separately enacted each subsection of the Abortion

Act, regardless of whether another subsection was held unconstitutional. The Tenth Circuit, however, ignored this clear statement of legislative intent. Instead, the court relied on a policy statement adopted by the Utah Legislature via a joint resolution. According to the court, the joint resolution conveyed a legislative intent to prohibit all abortions. The court found that anything short of a near-total ban on abortions would frustrate this intent. This joint resolution was never subsequently codified. It is apparent that the court was being selective with respect to which part of the joint resolution it wished to highlight. The first part of the joint resolution provides that "[t]he policy and position of the Legislature is to favor childbirth over abortion, and [to regulate abortion] **as permitted by the U.S. Constitution**" (emphasis added). H.J.R. Res. 39, 48th Leg., 1990 Utah Laws 1555. The Tenth Circuit completely ignored this part of the joint resolution. Given the fact that the Utah Legislature expressly stated that it would have enacted each subsection of the Abortion Act, regardless of whether another subsection was held unconstitutional, and considering the policy statement found in Joint Resolution 39, which evinced a legislative intent to regulate abortion as permitted by the U.S. Constitution, it is evident that the Tenth Circuit's ruling was clearly erroneous.

Under Utah law, the relevant inquiry should have been whether subsection 76-7-302(3) could operate without the invalidated portion and still serve a legitimate legislative

purpose. Subsection 76-7-302(3) certainly serves a legitimate legislative purpose. A reading of the Utah Abortion Act reveals that the Utah Legislature intended to enact the most stringent abortion law permitted by the United States Constitution. The essence of the Tenth Circuit's reasoning is that if the Utah Legislature could not enact a law restricting pre-viability abortions, it would not have passed any laws restricting abortion, in this case, post-viability abortions. This reasoning is flawed and leads to an absurd result.

Although this Court will normally defer to the construction of a state statute given it by the federal courts, this is not always the case. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985). As was stated in *Brockett*, the Supreme Court "surely [has] the authority to differ with the lower federal courts as to the meaning of a state statute." *Id.* In *Brockett*, the plaintiffs challenged a moral nuisance law which set forth a comprehensive scheme providing for civil and criminal penalties for those dealing in obscenity. The plaintiff's alleged that, pursuant to the First Amendment, the statutory definition of the word "prurient," which included the word "lust," was unconstitutionally overbroad. The Ninth Circuit agreed with the plaintiffs, finding that the definition of "prurient" was unconstitutionally overbroad in that it banned constitutionally protected material that merely stimulated normal sexual responses. This Court reversed, holding that the Ninth Circuit erred in invalidating the statute.

In reaching its conclusion, the Court reiterated some

"cardinal rules" which are to govern federal courts addressing the constitutionality of a statute. First, courts are to be mindful of "'the elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.'" *Brockett* 472 U.S. at 502 *quoting Allen v. Louisiana*, 103 U.S. 80, 83-84 (1881). Second, a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it. Thus, partial, rather than facial invalidation, is the required course.

Guided by these principles, this Court invalidated the Washington law only insofar as the word "lust" was understood to be reaching protected materials. Amici would note that the Washington law at issue in *Brockett* contained a severability clause, just as the Utah law in the case at bar. In *Brockett*, the Court, applying Washington law regarding severability, found the statute severable and upheld the constitutional portion of the law. As Petitioners have pointed out, the Washington severability test applied in *Brockett* is the same test applied by the Utah Supreme Court. Amici submit that the severability clause in the Utah Abortion Act is an even more explicit savings clause than the severability statute at issue in *Brockett*. Consequently, the Tenth Circuit erred when it held that subsection 76-7-302(3) was not severable from the unconstitutional portions of the statute.



This Court has held that it will refuse to defer to lower courts on state-law issues where there is "plain" error, *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943); where the lower court is "clearly wrong," *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959); or where the construction is "clearly erroneous." *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960). In fact, the Court has done so in abortion cases. See *Webster*, 492 U.S. 490 (1989) (the Court rejected both the district court's and the Eighth Circuit's construction of the Missouri abortion law); *Connecticut v. Menillo*, 423 U.S. 9 (1975) (where the Court vacated the Connecticut Supreme Court's construction of a state law prohibiting attempted abortion by any person, as it applied to a non-physician). Short of enacting separate bills on pre-viability and post-viability abortions, what more could the Utah Legislature have done to clarify its intent? Amici submit that the Tenth Circuit's application of Utah state severability law constituted plain error, was clearly wrong, and that its construction thereof was clearly erroneous. Moreover, the effect of the court's erroneous interpretation of state law was to enjoin Utah officials from enforcing constitutional portions of the Utah Abortion Act. This Court should therefore defer to the district court's interpretation of Utah severability law. Furthermore, this Court should exercise its supervisory authority and grant Petitioner's writ, thereby upholding the principles of federalism which underlie the Eleventh Amendment.

## II.

**THE TENTH CIRCUIT'S RELIANCE ON THE RULES APPLIED IN THORNBURGH V. AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, 476 U.S. 747 (1986) WAS MISPLACED IN LIGHT OF THIS COURT'S SUBSEQUENT HOLDING IN PLANNED PARENTHOOD V. CASEY, 112 S.CT. 2791 (1992).**

Pursuant to the Utah Abortion Act, post-viability abortions are permissible for only three reasons: (1) to save the pregnant woman's life; (2) to prevent grave damage to the pregnant woman's health; and (3) to prevent the birth of a child that would be born with grave defects. Utah Code Ann. § 76-7-302(3) (1991). Sections 76-7-307 and 308 of the Abortion Act further require that the medical procedure and the medical skills used in a post-viability abortion must be calculated, in the "best medical judgment of the physician," (see Utah Code Ann. § 76-7-304) to give the unborn child the "best chance of survival," while at the same time preventing the pregnant woman's death or grave damage to her health.

The Tenth Circuit struck down sections 76-7-307 and 308, holding that, pursuant to *Thornburgh*, the statutes impermissibly increased the medical risks to women choosing to terminate their pregnancies, thereby placing an undue burden upon a woman's right to choose an abortion. Amici submit that the Tenth Circuit's reliance on *Thornburgh* was misplaced, as *Thornburgh* cannot be reconciled with this Court's subsequent ruling in *Casey*. This case presents an

issue which was left undecided in *Casey*, which should be authoritatively addressed by this Court.

The choice-of-method-provisions of the Utah Abortion Act apply only when there is a reasonable possibility that an unborn child can survive outside the womb. At that point, the State clearly has a valid interest in protecting the life of an unborn child. In *Casey*, this Court held that viability was the "point at which the State's interest in fetal life is constitutionally adequate to justify a ban on nontherapeutic abortions." 112 S.Ct. at 2811. The Court reasoned that viability constituted the point at which "there is a realistic possibility of maintaining and nourishing life outside of the womb, so that independent existence of the second life can in reason and all fairness be the object of state protection . . . ." 112 S.Ct. at 2817. Utah's ban on nontherapeutic abortions after 20 weeks (21 weeks from the date of conception, or 23 weeks LMP) was reasonably designed to take effect at a time where life outside the womb is possible. Thus, at the time the provisions of sections 76-7-307 and 308 come into play, the state unquestionably has a compelling interest in protecting the viable unborn human life.

In addition to fixing the point of viability as the line of demarcation wherein the State's interest in protecting unborn life outweighs the woman's liberty interest in choosing to have an abortion, the *Casey* court also rejected the rigid trimester framework set forth in *Roe v. Wade*, 411 U.S. 113 (1973). The authors of the joint opinion declared that the need to

reconcile the liberty interest of the woman and the interest of the State in promoting unborn life required the abandonment of the trimester framework "as a rigid prohibition on all previability regulation aimed at the protection of fetal life." 112 S.Ct. at 2818. The Court further stated that "[t]he trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*." *Id.*

*Casey* also did away with the strict scrutiny test that had previously been followed in the Court's pre-*Casey* abortion jurisprudence. Under strict scrutiny, any regulation touching upon the abortion decision was sustained only if the regulation was drawn in narrow terms to further a compelling state interest. In its stead, the Court employed an undue burden analysis. Pursuant to the undue burden test, laws which "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" are invalid. 112 S.Ct. at 2821. With respect to post-viability abortions, *Casey* made it clear that the State, in furtherance of its interest in protecting unborn human life, may "regulate, and even proscribe, abortion except where it is necessary . . . for the preservation of the life or health of the mother." *Id.*

In the present case the Tenth Circuit nevertheless applied the rigorous trimester framework found in *Thornburgh* to invalidate Utah's choice-of-method provisions.



While *Thornburgh* has not been expressly overruled, Amici submit that is because the choice-of-method issue raised in this case was not presented in *Casey*. As the district court noted, *Casey* substantially undermined *Thornburgh*, and the Tenth Circuit erred in relying upon *Thornburgh* to invalidate Utah's law. In fact, the authors of the joint opinion in *Casey* specifically disapproved those parts of *Thornburgh* which are "inconsistent with Roe's acknowledgement of an important interest in potential life." 112 S.Ct. at 2823. The Tenth Circuit's application of *Thornburgh* was misguided. First, *Thornburgh* applied rules derived from *Roe*'s trimester framework which were abandoned in *Casey*. The Trimester approach was flawed in that it undervalued the State's interest in potential life. Second, the majority in *Thornburgh* applied a strict scrutiny standard under which few abortion regulations are able to survive. Strict scrutiny is clearly not applicable post-*Casey*.

Nevertheless, the Tenth Circuit, ostensibly applying an "undue burden" test, struck down Utah's choice-of-method provisions. However, if the Tenth Circuit's reasoning is correct, it would mean that the undue burden test set forth in *Casey* is in reality is no different than the rigorous trimester approach of *Roe*, as it was applied in *Thornburgh*. This cannot be the case.

The choice-of-method provisions at issue in this case do not place an undue burden upon a woman seeking to abort a viable fetus. Sections 76-7-307 and 308 are consistent with

*Casey*'s emphasis on the State's interest in protecting viable fetal life.

Here, the State of Utah has chosen to mandate that, "when the unborn child is sufficiently developed to have any reasonable possibility of survival outside of its mother's womb," a physician must use the procedure that will protect the unborn child unless a procedure designed to kill or injure the child will prevent grave damage to the woman's medical health. § 76-7-307. This requirement, which plainly furthers the State's interest in viable life, does not unduly burden a woman's liberty interest.

Section 307 does not forbid performance of the abortion. In fact, it authorizes procedures "designed to kill or injure [the] unborn child" any time such procedures, "in the opinion of the woman's physician," will "prevent grave damage to her medical health." And, in exercising his medical judgment, the physician is enjoined to "consider all factors relevant to the well being of the woman upon whom the abortion is to be performed including, but not limited to (a) her physical, emotional and psychological health and safety, (b) her age, and (c) her familiar situation." Utah Code § 76-7-304(1) (1974). This regulation is plainly constitutional under the *Casey* Joint Opinion analysis, which stresses that the State not only "has legitimate interests in the health of the woman," but also "in protecting the potential life within her." 112 S.Ct. at 2817.

Section 76-7-308 is constitutional under similar

analysis. It merely provides that, consistent with the purpose of saving the life of the woman or preventing grave damage to her medical health, a physician should use his or her medical skills to promote, preserve and maintain the life of the unborn child. Once again, all this section does is make clear that a physician has a duty to the unborn child consistent with his obligation to save the woman or prevent damage to her health. This section does nothing more than vindicate the State's substantial interests in viable life. It does not put any obstacle in the path of a woman seeking an abortion.

Amici therefore request that this Court issue the writ and revisit *Thornburgh*, using the undue burden standard applied in *Casey*.

#### CONCLUSION

For the foregoing reasons, Amici request that Petitioner's Petition for Writ of Certiorari be granted.

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